U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 1/5/2001

IN THE MATTER OF:	*	
	*	
Barbara L. Casey	*	
(Widow of John D. Casey)	*	
Claimant	*	
	*	
Against	*	Case No.: 2000-LHC-0369
	*	
General Dynamics Corporation	*	OWCP No.: 1-146606
Employer/Self-Insurer	*	
	*	
and	*	
	*	
Director, Office of Workers' Compensation Programs, United States Department of Labor	*	
Party-in-Interest	*	

APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Colette S. Griffin, Esq.
For the Employer/Self Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 29, 2000 in New London, Connecticut, at

which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
EX 14A	Attorney Griffin's letter advising that the Employer will not be taking the deposition of Dr. Pembrook	07/26/00
EX 14	Attorney Griffin's letter filing the	07/27/00
EX 15	July 19, 2000 Supplemental Report of Dr. Gee	07/27/00
CX 14	Attorney Embry's letter advising that Claimant has no objections to EX 15	07/28/00
EX 15A	Attorney Griffin's letter suggesting a briefing schedule	08/14/00
CX 15	Attorney Embry's letter filing the	09/05/00
CX 16	August 4, 2000 report of Dr. Pembrook	09/05/00
EX 16	Attorney Griffin's letter objecting to CX 16 as late-filed	09/18/00
CX 17	Attorney Embry's response to EX 16	09/25/00
EX 17	Attorney Griffin's letter requesting an extension of time for the parties to file	09/27/00

	their post-hearing briefs[1]	
CX 18	Attorney Embry's response	10/02/00
CX 19	Claimant's **Motion For Permission To File Exhibit Out Of Time**	10/18/00
Ex 18	Employer's objection thereto	11/03/00
CX 20	Claimant's response[2]	11/13/00
CX 21	Attorney Embry's letter confirming the briefing schedule	11/27/00
EX 19	Employer's brief	12/04/00
CX 22	Claimant's brief	12/14/00
CX 20	Attorney Griffin's letter requesting another copy of ALJ EX 11 (the copy was sent to counsel)	12/14/00

The record was closed on December 14, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find

1. The Act applies to this proceeding.

2. Decedent and the Employer were in an employee-employer relationship at the relevant times.

3. On September 24, 1997 Decedent passed away.

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[1]Employer's request was granted.

[2]Claimant's motion is **GRANTED** (ALJ EX 11) because Dr. Pembrook's supplemental report (CX 16) was filed as rebuttal to Dr. Gee's supplemental report (EX 15), also filed post-hearing, to which Claimant interposed no objection. (CX 14)

4. Claimant gave the Employer notice of the alleged injury and death on or about October 24, 1997.

5. Claimant filed a timely claim for compensation on or about that date and the Employer filed a timely notice of controversion at that time.

6. The parties attended an informal conference on October 20, 1999.

7. The applicable average weekly wage is $400.57, the National Average Weekly Wage as of the date of death on September 24, 1997.

8. The Employer has paid no benefits herein.

9. Barbara Casey (“Claimant” herein) is the Decedent’s surviving widow pursuant to the Act.

10. Funeral expenses exceeded $3,000.00.

The unresolved issues in this proceeding are:

1. Whether Decedent’s pulmonary condition constitutes a work-related injury.

2. If so, whether such injury played a part in his death.

3. Claimant’s entitlement to an award of Death Benefits and reimbursement of funeral expenses up to the statutory limit of $3,000.00.

Procedural History

John D. Casey (“Decedent” herein), worked for the Electric Boat Corporation (“Employer:), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. Decedent began at the shipyard in 1961 as a warehouseman and material handler and, in the course of his maritime employment, he was exposed to a variety of pulmonary irritants, including a significant amount of sandblasting dust, smoke and debris generated as part of the sandblasting operations at the shipyard. In 1977 Decedent sustained an injury to his back in a shipyard accident. He filed a claim for workers’ compensation benefits under the Act and Decedent, having been found to be permanently and totally disabled as a result of such injury,

was awarded benefits for such disability and he received those benefits until his death on September 24, 1997. Although Decedent was declared to be permanently and totally disabled prior to the effective date of the 1984 Amendments to the Act, Death Benefits were not continued to the Claimant as there now must be a finding that the work-related injury played a part in her husband's death, a requirement added by the 1984 Amendments. Thus, the need for this proceeding becomes apparent.

Summary of the Evidence

Ronald W. Peterson, who worked at the Employer's shipyard from March of 1963 to his retirement in April of 1996, testified that he held a variety of "management jobs" at the shipyard, that he knew and worked with the Decedent, that Decedent worked for him as "a warehouse material handler," mostly at the Employer's so-called Midway Facility where his duties involved, **inter alia**, receiving, storing and laying out material that was fabricated into components and sections for installation on the boats being repaired, built or overhauled at the shipyard. When the Midway Facility was closed, the Employer "moved that whole facility to the (main shipyard at) Groton" and Mr. Peterson remained in charge thereof in the North Yard. According to Mr. Peterson, sandblasting of the metal components took part in that facility and Decedent "absolutely" would be exposed to the silica dust and debris generated by the sandblasting operations and he would be performing his duties within fifty to one hundred feet of such sandblasting, Mr. Peterson remarking that his clothes would be dirty at the end of the work day. "Black Beauty," a coarser type of sandblasting grit, was used in the late 1960s and thereafter as the abrasive material as part of the sandblasting operations, **i.e.**, "a high powered, forceful, shotblast material that blasts material (including rust) off steel, particularly paint... prior to welding." Such blasting caused sandblasting dust and debris to float around the ambient air of the work environment and those in the area would be exposed to and inhaled such pulmonary irritants. Decedent and Mr. Peterson did not wear respirators in the performance of their assigned duties. (TR 40-46)

According to Mr. Peterson, the city of New London complained to the Employer "because of the silica and shotblast that was drifting across the (Thames) River to New London" but he did not know when this took place, Mr. Peterson concluding, "And at that particular time, that's really the start of the more protective type environment" at the shipyard. (TR 53-54)

Barbara L. Casey ("Claimant") testified that her husband

worked at the shipyard as a warehouseman, that he worked in close proximity to the sandblasters, initially at Wesco in the main yard, that she often picked up her husband at the shipyard and drove him home and that her husband never was wearing a protective mask when she picked him up, notwithstanding any written report to the contrary. Claimant admitted that her husband carried a diagnosis of emphysema, that he was taking medication therefor, that his doctors had advised him to stop smoking cigarettes and drinking, that he also suffered from diabetes, hypertension, heart disease and prostate cancer. (TR 57-65)

Prior to the hearing, the parties deposed Barbara Casey ("Claimant" herein), and Claimant, who was born on September 15, 1920 and who married John D. Casey ("Decedent") on March 8, 1947, testified that her husband began to work at the shipyard in 1961, that he last worked at the shipyard in September of 1977, that he worked at the shipyard as a warehouseman and that his work exposed him to sandblasting grit and other pulmonary stimuli. According to Claimant, her husband did not work after 1977 because "he injured his back badly" in a shipyard accident and because he "just went downhill" after that. During "his last four or five years ... the doctor found he had emphysema" and "congestive heart failure." Decedent's family doctor was Dr. Millhofer in Norwich and, as the doctor moved to the Cape, Dr. Hein took over his treatment. He was then referred to Dr. Powell, a pulmonary specialist, for evaluation and treatment of the emphysema. Dr. Edgar, an orthopedic physician, treated Decedent's lumbar problems. Dr. Friedman, a urologist, also treated Decedent. (ALJ EX 10 at 3-9)

Decedent passed away on September 24, 1997 and at the time of his death he was receiving workers' compensation benefits and his pension from the Employer. Decedent was taking medication for hypertension for several years prior to his death, for which condition he was being treated by Dr. Millhofer. Decedent passed away after sustaining "a massive heart attack." Decedent underwent hip replacement and prostate surgery several years before his death. Decedent led a sedentary life prior to his death because he "wasn't able to do much of anything," Claimant remarking, "He did very little of anything in the house any more" and "(e)verything (Claimant) had done had to be hired" out to someone else. Claimant had very little knowledge of her husband's specific work duties but she did know that "he was a warehouseman for a while." (**Id.** at 9-15)

The Employer has offered the June 15, 2000 report and testimony of Dr. Bernard L. Gee (TR 69-149) and the doctor, who is a recognized expert in pulmonary, thoracic and cardio-pulmonary diseases, testified that he reviewed Decedent's medical records at

the Employer's request by letter dated March 27, 2000 and that his review of those records led him to conclude that Decedent did not have silicosis. According to the doctor, Decedent "had primary cardiac diseases, which caused both symptoms and death." Dr. Gee reviewed Decedent's chest x-rays of November, 1992, 1994 and March 30, 1995 and these affirmed his opinion that Decedent "died from heart failure, diabetes and kidney failure, and also had coronary obstructive pulmonary disease," the doctor remarking "there's no reason to believe he had simple or complicated silicosis." (TR 65-79)

Dr. Gee testified that Decedent's "cause of death was congestive heart failure in the setting of coronary artery disease in an elderly person with diabetes and secondary renal failure" and that he "was also treated for COPD," chronic obstructive pulmonary disease, a condition "which could include emphysema" as a component. Dr. Gee found no evidence of "silicosis being at least majority a nodular disease." Moreover, Decedent's fluctuating changes in his lung function, as observed clinically, were due primarily to his "left ventricular failure..." in varying degrees causing breathlessness to severe dyspnea down to even fine pulmonary edema." Dr. Gee could "find no evidence that this gentleman suffered from silica, in a disease sense" and the doctor did not "believe that those exposures (to sandblasting) taken at their current value, caused demonstrable silicosis defined as a nodular disease, or in the more severe so-called progressive massive fibrosis, which is a nasty disease." According to the doctor, "Silicosis itself in the simple form is not responsible for deteriorations in lung function" The Death Certificate "described (the immediate cause of death as) cardiopulmonary arrest due to left ventricular failure" and Dr. Gee agreed with that certification, the doctor remarking that "in August 1997, (Decedent's) attending physician states that he has (had) an acute myocardial infarction and things go bad from then on." Decedent's heart attack was caused by his "background of coronary artery disease," his diabetes, his renal failure and perhaps even a condition called alcohol cardiomyopathy. Dr. Gee found no evidence of any progressive massive fibrosis. (TR 81-89)

Dr. Gee reviewed Dr. Pembrook's February 15, 1999 report (CX 1) of his review of Decedent's medical records and Dr. Gee agreed that Backus Hospital records substantiated Dr. Pembrook's' opinion that "the terminal event was pulmonary edema and arrhymthmias" but he disagreed with the doctor's opinions that "pulmonary heart disease is characterized by a high incidence of cardiac arrhythmia" and that "he has chronic pulmonary silicosis," although Dr. Gee testified, "Well, there are certainly some (arrhythmia), but they are nowhere near the incidents (sic) you get with myocardial

infarction and ischemic disease." According to Dr. Gee, pulmonary massive fibrosis (PMF) is "usually startlingly obvious on the chest x-ray" and is "so gross you cannot miss it" and, as a "nasty" disease, "it's fatal, it does cause hypertension, it causes cardiac damage, and it's about a five, six year survival" rate. (TR 89-92)

According to Dr. Gee, "systemic hypertension" is caused by a number of factors and chronic systemic hypertension can have an adverse effect on a person's heart as "chronic high blood pressure is a lethal disease in which you die either of strokes, bleeds or left ventricular failure . . . for kidney failure." As Decedent's blood pressure readings were not that high, any hypertension would only be a minor contributing factor to Decedent's death "because the real problem lies in (his) cardiac changes, myocardial infarction, the ischemic heart disease, the coronary artery disease." Dr. Gee did not believe that Decedent's maritime exposures to silica and dust at the shipyard played any part in his death. (TR 93-95)

In response to intense cross-examination (TR 95-137, 145-149), Dr. Gee agreed that some physicians and radiologists have read Decedent's chest x-rays as showing interstitial disease, a so-called marker of prior exposure to asbestos dust and fibers, that Decedent's "physicians were treating him" for COPD, that a chronic increase in interstitial markings of the lung in a non-specific pattern was seen on Decedent's March 30, 1995 chest x-ray, that Decedent "most unlikely" did not have congestive heart failure when he was examined by Dr. Pembrook at the Employer's request in connection with Decedent's 1977 back injury, that Dr. Pembrook found restrictive changes on pulmonary tests and that Dr. Pembrook found the existence of some pulmonary disease in 1981 but "it would not be of a cardiac nature." (TR 95-107)

According to Dr. Gee, simple silicosis is "marked by upper lobe nodular legions (sic) of varying sizes, in which in additional (sic) you may or may not have eggshell calcification." Dr. Gee, after considerable prodding by and verbal jousting with Claimant's counsel, finally agreed that an individual who has simple silicosis would be at risk of developing cor pulmonale or pulmonary hypertension "in a small percentage of patients who develop" PMF, that mixed lung disease can result from exposures to free silica and other less fibrogenic dust at the same time, that the medical treatise of Dr. Chung and Dr. Green, cited by Claimant's counsel, is "certainly authoritative," that mixed lung disease can result in a mixed fibrosis in certain industries, such as iron and steel foundries but not necessarily at a shipyard, although the doctor admitted that he has not visited the Employer's "shipyard except on the submarine... and that was underwater" and that he has only a

"limited understanding" of shipyard construction. When asked as to whether or not, in the case of mixed lung disease, it would take a longer period of time for the fibrosis to develop into regular opacities, rather than the classic nodular opacities that one finds in pure silicosis, Dr. Gee was reluctant to answer that question until he has seen Decedent's other chest x-rays which had been in Dr. Pembrook's possession but which were on that way to Dr. Gee for his review. (TR 107-117)

Dr. Gee also reluctantly agreed that inhaled silica particles are "deposited, in among other places, in the alveoli" and "eventually" engulfed by alveolar macrophages, that "silica in the appropriate amount over appropriate time periods will cause an inflammatory and heating reaction to the lungs," that "(s)ome of the leaks will be prevented and defensive measure which, however, can become overwhelmed and develop into an entity called silicosis," as well as "progressive massive fibrosis," that the so-called latency period (**i.e.** the interval between first exposure to silica dust and the manifestation of problems therefrom) "depends on the dose and the nature of the silica," the doctor agreeing with Claimant's counsel, "You are right in saying some chronic disease, then you're talking about ten years or so... from most of them if you have it." Dr. Gee also agreed that a latency period of sixteen years or so would be reasonable if Decedent had been first exposed to silica in 1965 and the manifestation of abnormal pulmonary function tests in 1981, but the doctor would "like to see those function tests." Dr. Gee would recommend that a person with COPD certainly stop smoking but he would not answer definitively as to whether such person should avoid sandblasting operations, and such verbal jousting is again reflected at pages 128-137 of the transcript. (TR 117-127)

Dr. Gee, in response to redirect, opined that Decedent's COPD was not related to Decedent's shipyard employment, that "emphysema is a part" or "component of some COPD but not in everyone," that his COPD is due solely to his cigarette smoking history, that neither he nor Dr. Carl E. Shore, Chief of the Pulmonary Radiology Department at Yale-New Haven Hospital, saw any evidence of silicosis in "probably about half" of Decedent's chest x-rays, that silicosis is not "a restrictive lung disease until you've got PMF and (Decedent) clearly doesn't have that, and he certainly didn't have that in 1980," based upon Dr. Pembrook's 1980 (or 1981) report, and that Decedent's death was due to "congestive heart failure, coronary artery disease in an elderly patient with diabetes and secondary renal failure," as well as the possibility of a myocardial disease from alcohol," and Decedent's maritime employment played no part in his death. (TR 137-144)

Dr. Gee, in response to recross-examination, admitted that Decedent's limited cigarette smoking history, as of the time he saw Dr. Pembrook in 1981, was not a factor in the pulmonary disease reported by Dr. Pembrook in 1981 as Decedent "just started smoking heavily" after he was examined by Dr. Pembrook, especially as he started smoking only four years earlier, the doctor agreeing that it takes "decades" to develop emphysema as a result of cigarette smoking. (TR 145-148)

Dr. Gee's **Curriculum Vitae** is in evidence as EX 12. Decedent's voluminous medical records, in evidence as CX 1 - CX 13 and EX 1-EX 13, will be briefly summarized herein to put this matter in proper perspective for the benefit of the parties and for reviewing authorities.

As noted Dr. Gee has issued his one page report on June 5, 2000 (EX 13):

John D. Casey

I received a box of medical records on the above gentleman who died 9/24/97 aged 77. The cause of death is listed as cardiopulmonary arrest due to LV failure. This gentleman has a history of cigarette and ethanol usage, COPD, diabetes, CAD with episodes of CHF and prostate cancer. In 9/97, at Backus Hospital he was already under treatment for CHF (Lasix, nitrites, captopril) and an apical systolic murmur, chest rales (CHF) and various arrhythmias. Ejection fraction was 25%; LV was dilated. Chest X-Ray reported as cardiomegaly and CGF/COPD. No nodules are mentioned here. Dr. Greif diagnosed in 9/8/97 an acute MI and worsening renal failure from poor perfusion and diabetes. The discharge summary (11/10/97) confirms the above including LV failure and heart failure steadily progressed and life support was precluded by the family.

Opinion:

1. The illness was clearly cardiac with severe CGF/CAD in a 77-year-old gentleman. Additionally an alcohol related cardiomyopathy is possible. There is little evidence of pulmonary hypertension though, were it to be present, LV failure and COPD would provide a full explanation for that hypertension.

2. There is no CXR (chest x-ray) report indicating features of silicosis either simple of complicated varieties in 3/91/ 4/93, 4/94 and 3/95. Dr. Pembroke's (sic) letter does not really indicate reasons to diagnose silicosis. Any "interstitial" radiologic features reflect CHF and not primary

lung disease.

To conclude, pending availability of Chest X-Rays the cause of death was CHF/CAD in an elderly person with diabetes and secondary renal failure. He was treated for COPD and there is no present evidence of an occupational lung disease and no reason to inculpate the latter in the terminal illness, according to the doctor.

Dr. Gee issued the following supplemental report on July 19, 2000 (EX 15):

I have reviewed a series of chest x-rays including dates of 6/21/95, 12/31/96, and several sets (PA/LAT, portables) in 1997. The first dated films (3 PA and one LAT) are the most relevant from the pulmonary standpoint. These films are of fair to poor quality (heart muscle and spine bone shadow not being distinguishable. They show much soft tissue, no plaques and no interstitial nor nodular disease. The films of 12/31/96 are fair quality but also show no features of primary pleural or pulmonary disease. All show aortic calcification and a LLL rib fracture. The 1997 films reflect a cardiac dysfunction, pulmonary edema, an L. basal small effusion and fluid in all fissures.

Thus

1. There is no radiological evidence of nodular or opacity features on these films nor evidence of asbestosis though by 1997 serious cardiac problems are evident.

2. The issues of mixed dust pneumoconiosis and silicosis have been raised but there is no radiology evidence of either entity.

3. We note mixed dust pneumoconiosis has radiological features somewhat similar to silicosis though the opacities are somewhat smaller and progress (when present) more slowly. (Seaton. **Occ. Lung Disease,** 3rd Edition, Chapter 12 p249, eds. Morgan and Seaton).

To conclude: There is still, in my opinion, no reason to ascribe any role in the unfortunate demise to work related issues, and no reason to implicate any work related lung abnormalities in any part of the illness or death, according to Dr. Gee.

Decedent's personnel records reflect that he served honorably in the U.S. Army from January 14, 1938 to August 15, 1940 and again from August 15, 1940 through September 9, 1945 and began working at the shipyard on November 8, 1961. (CX 3)

Initially, I note that the Employer had Decedent examined on May 11, 1981 by Dr. Richard C. Pembrook, a specialist in cardiovascular disease, in connection with Decedent's work-related back injury on July 8, 1977, and Dr. Pembrook, by letter of June 12, 1981 to the Employer (CX 5), concluded as follows:

He does, however, have a chronic lumbo-sacral ligament strain. None of Mr. Casey's back diseases render him totally disabled. Mr. Casey would be able to perform as a salesman with little or no difficulty. He should probably go back into this line of work since he knows it from previous experience. He would no longer be able to work as a warehouseman because of his back disease...

Mr. Casey does have a significant degree of high frequency hearing loss. His hearing loss is work related and is secondary to noise trauma. He has poorly controlled diabetes mellitus and his diabetes is not work related. He has both ischemic heart disease and rheumatic valvular heart disease. His heart diseases do not confer any particular disability at the present since his physical activity is limited for other reasons. Mr. Casey has a mild degree of chronic restrictive lung disease of uncertain etiology. He has systolic hypertension. He is an intermittent heavy user of alcohol. Mr. Casey is more disabled from these multiple disabilities than he would be from his back injury alone. Thank you for permitting us to see this challenging man, according to Dr. Pembrook.

A formal hearing was held on April 13, 1981 in connection with that 1977 shipyard accident and the presiding Judge was my distinguished colleague, now retired Judge Frederick D. Neusner, the transcript of which is in evidence as EX 9, and while that proceeding centered upon Decedent's lumbosacral problems and his claim for permanent and total disability beginning on October 11, 1977, Decedent, who was born on January 5, 1920 and who had a tenth grade education and who had an employment history of manual labor, testified that he began working on November 8, 1961 in the Plate Shop at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. Decedent, describing that work as "considerably heavy," performed that job for six months and he then transferred to work as a warehouseman, working involving, **inter alia**, "supplying the trades with various types of steel, work which for the first ten years or so involved much "lifting, pulling or yanking" without the benefit of any "material handling devices," such as forklifts, chain falls, etc. (CX 9 at 30-51)

Decedent testified that he had carried diagnoses of hypertension and sugar diabetes for years, that he had been taking medication therefor for at least four years, that Dr. Edgar was treating his lumbar problems and that Dr. Quintiliani was his family physician at that time. (**Id.** at 57-59)

Dr. Franklin P. Friedman was Decedent's family physician from June 20, 1989 to at least July 18, 1997 and the doctor's progress notes are in evidence as EX 8.

Decedent's medical records also reflect that he was transported by ambulance to the WWBH on December 31, 1996 and September 8, 1997 because of difficulty breathing and for treatment of his respiratory distress. (EX 9)

Decedent's medical records relating to his treatment at the WWBH from January 15, 1981 through September 24, 1997 are in evidence as EX 11.

Dr. Edgar's progress notes for Claimant's left hip problems in 1982 and 1987 are in evidence as EX 10.

Dr. Millhofer became Decedent's family physician and he referred Decedent to Dr. Michael D. Hein "for assumption of general medical care upon his leaving the area." Dr. Hein took a history report that Decedent, as of March 29, 1995, had carried a diagnosis of diabetes for the prior 28 years, that Glucotrol had been prescribed for such condition, that Decedent's past medical history included hypertension, prostate cancer (EX 1A), congestive heart failure, COPD, previous, ETOH abuse, pancreatitis, OA/DJD, etc., as well as a left hip replacement, back operation, and that his medications included Prinivil, Isordil, Seldate and Lasix. As of that date, Decedent was still smoking one pack of cigarettes every three days and had discontinued ETOH abuse ten years earlier. Dr. Hein, after reviewing Decedent's diagnostic tests and the physical examination, gave this assessment (CX 4):

1. NIDDM with non-compliance to all forms of recommendations.

2. (Previous?) ETOH abuse.

3. Ca of the prostate under good control?

4. COPD with continued tobacco abuse.

5. LVH with hypokinesis and probable CAD.

Dr. Hein continued to see Decedent as needed and he constantly

urged Decedent to discontinue tobacco and alcohol use and that he "stick to a diabetic diet." (**Id.**) In early 1997 Decedent was admitted to the WWBH for evaluation and treatment of his congestive heart failure/COPD/Pneumonia and Dr. Hein saw him in follow up. (**Id.**) Decedent's medical records relating to his various admissions to and treatment at the WWBH are in evidence as CX 8.

Dr. Pembrook left Connecticut and moved to Las Vegas, New Mexico and he now serves as Medical Director, Northern New Mexico Rehabilitation Hospital, and as Deputy Medical Director, Las Vegas Medical Center; the doctor's current letterhead (EX 5c) reflects that he is a Fellow of the American College of Physicians and is also a Fellow of the Counsel of Clinical Cardiology of the American Heart Association.

Claimant has also offered the February 15, 1999 report of Dr. Pembrook wherein the doctor states as follows (CX 1):

Thank you for your letters of April 6, 1998 and January 7, 1999 concerning your deceased client, John Casey. After studying Mr. Casey's records and his chest x-rays from Backus Hospital, I do believe that Mr. Casey's pulmonary condition contributed to his death.

Mr. Casey certainly had an exposure history consistent with occupational lung disease. For instance, he was exposed to sand blasting from November 8, 1961 to March 17, 1963. This exposure would predispose him to a chronic progressive fibrosis of the lungs called Pulmonary Silicosis.

Pulmonary Silicosis could easily have been the cause of the restricted vital capacity that I found on testing Mr. Casey in my office in June, 1981. On physical examination at that time Mr. Casey's diaphragmatic movement was reduced. This reduced diaphragmatic movement would also be consistent with chronic restrictive lung disease.

Mr. Casey was exposed to sand blasting even when he was not working in the plate shop between 1961 to 1963. This additional exposure was proven by copies of "employer's first report of injury", copies of which were included among the records that you sent to me on Mr. Casey. Such employer's first reports on July 13, 1973, August 23, 1973, July 2, 1974, and June 27, 1974 all mentioned that Mr. Casey was working in a sand blasting area even though he was occupying a position as a warehouseman at the time.

Additional information concerning Mr. Casey's exposure to sand blasting materials was obtained by reviewing his chest x-rays which

were sent to me from Backus Hospital.

The first set of chest x-rays was dated June 21, 1995 and included a P.A. and lateral chest x-ray. This x-ray was important because it provided a baseline against later chest x-rays which showed much cardiomegaly and pulmonary congestion. On June 21, 1995, Mr. Casey's heart size was within normal limits but the interstitial markings of the lungs were increased throughout.

On December 31, 1996, there was a portable chest x-ray which showed increased heart size but no interstitial fluid. It would appear that Mr. Casey had been admitted to Backus Hospital on that date because of congestive heart failure. For the next three days, chest x-rays were taken every day. The chest x-ray taken the following day on January 1, 1997 now showed definite evidence of congestive heart failure and the same could be said on the following day on January 2, 1997 when another portable chest x-ray was taken. On January 3, 1997, a P.A. and lateral chest x-ray were taken and the lateral film showed that Mr. Casey had an increased anterior posterior diameter to his chest. By then, it appeared that his congestive failure was getting better (?).

On August 8, 1997, a P.A. and lateral chest x-ray were taken and these were very helpful in making the diagnosis of Pulmonary Silicosis. On August 8, 1997, there was evidence of diffuse interstitial fibrosis with the diaphragmatic pleura being tented focally by adhesions. There were also evidence of adhesions in the minor fissure on the right.

On September 8, 1997, a series of daily chest x-rays was begun. This was the day that Mr. Casey's final admission to Backus Hospital. On September 8, 1997, the chest x-ray showed evidence of cardiac enlargement and pulmonary edema. Things were much the same one day later on September 9, 1997. On September 10, 1997, a portable chest x-ray showed evidence of an increase in interstitial fluid. On September 11, 1997, a portable chest x-ray showed increased interstitial markings and cardiomegaly. All x-rays done on Mr. Casey showed laminar calcification in the aortic knob.

I believe that Mr. Casey had chronic restrictive lung disease secondary to Pulmonary Silicosis. He acquired his Pulmonary Silicosis as a result of job exposures to sand blasting materials at the Electric Boat Company. Mr. Casey's exposure history, spirometry readings, physical findings, and chest x-rays are all consistent with a diagnosis of Pulmonary Silicoses.

It is to be noted that the radiologist at Bachus Hospital also felt that interstitial lung disease was present. The reading of the

September 9, 1997 chest x-ray by the radiologist included the reading “underlying chronic generalized interstitial disease.”

The severity of Mr. Casey’s lung problems and its effects on arterial oxygenation and cardiac hemodynamics are well-illustrated by the arterial blood gases done at Bachus Hospital. These ABG’s revealed severe oxygen desaturation of arterial blood. The echocardiogram done at Bachus Hospital was also consistent with severe pulmonary hypertension.

The findings on this echocardiogram including both tricuspid regurgitation and pulmonic regurgitation as well as a right ventricular pressure of 58 were all consistent with severe pulmonary hypertension. Mr. Casey’s severe pulmonary hypertension was probably due chiefly to the silica-induced severe pulmonary interstitial fibrosis. This much pulmonary hypertension would surely predispose Mr. Casey to varied, frequent, and severe cardiac arrhythmias.

It is to be noted that Mr. Casey’s pulmonary problems were superimposed upon an array of cardiac problems. For instance, his echocardiogram revealed a calcified mitral valve. A calcified mitral valve is diagnostic of chronic rheumatic heart disease. The history of being hospitalized in England with rheumatic fever in 1942 provides a strong cue that rheumatic cardiac valve damage had probably begun at least by 1942. Mr. Casey also had scarlet fever in childhood. Scarlet fever also often leads to rheumatic valvular damage. In addition, when I examined Mr. Casey in my office (I noticed) auscultatory findings suggesting aortic valvular sclerosis. The finding of aortic valvular sclerosis was later confirmed at echocardiography.

When I saw Mr. Casey in 1981 he was taking Aldoril, a blood pressure pill; hence Mr. Casey very likely had chronic high blood pressure even then. His discharge diagnosis from Bachus Hospital also included the diagnosis of Systemic Hypertension. It is noted that Mr. Casey had been hospitalized with renal stones in the past; kidney damage secondary to renal stone disease often results in chronic high blood pressure. Additionally, Mr. Casey’s blood pressure was elevated when I examined him in my office. At that time I obtained a blood pressure of 160/90.

When I examined Mr. Casey in my office, a carotid artery pulse showed a prominent anacrotic notch high on the ascending limb. This finding, also, was consistent with mild valvular aortic stenosis.

Mr. Casey had a number of indications that he was a heavy user of

alcohol. This could very well have damaged his heart muscle also. His final diagnosis included: Dilated Cardiomyopathy and either alcohol or Diabetes could have done this but alcohol was the more likely cause.

Even at the time of his visit to my office in 1981, Mr. Casey already had abundant evident of ischemic heart disease secondary to deceased coronary arteries. For instance, his Apex Cardiogram revealed a late systolic bulge, indicating that the heart walls had been damaged.

An M Mode ultrasound examination of the heart performed in my office in 1981 revealed reduced contractility of the interventricular septum consistent with his ischemic heart disease.

Mr. Casey's final review work sheet from Bachus Hospital lists secondary cardiomyopathy as one of his diagnosis. This might have been either alcoholic cardiomyopathy, diabetic cardiomyopathy, or the cardiomyopathy of chronic lung disease, or all three.

During Mr. Casey's final admission to Bachus' Hospital on September 8, 1997, he had several acute cardiac problems superimposed upon the chronic cardiac problems. The acute cardiac problems included an acute inferior myocardial infarction, pulmonary edemas, and multi-form and frequently changing cardiac arrhythmias. The terminal event was probably a culmination of pulmonary edema and cardiac arrhythmia.

Pulmonary heart disease is usually characterized by a high incidence of cardiac arrhythmias. These arrhythmias are often difficult to control. I believe that Mr. Casey's chronic Pulmonary Silicosis resulted in severe pulmonary hypertension which, in turn contributed to his pulmonary edema and triggered his fatal cardiac arrhythmia, according to Dr. Pembrook.

Dr. Pembrook, by letter dated April 12, 2000 (EX 5), identified the specific medical records that he reviewed prior to submitting his February 19, 1999 report to Claimant's attorney. (CX 1)

The Employer had some of Decedent's medical records review by Dr. J. Bernard L. Gee, a noted specialist in Pulmonary and Critical Care Medicine and the doctor sent the following letter to the Employer on March 27, 2000 (EX 7):

This report is based on brief records and a letter by Dr. Pembrook (2/15/99)

The record indicates diabetes, chronic alcoholism and cigarette smoking as early as 1988 when lungs were described as clean. In 1996, age 76, notes indicate "an average of six vodkas and six beers per day" but admits to drinking more heavily in the last week. By then had developed CHF with hospitalization, and prostate cancer. PHO2 then 60, EKG LBB. Received digoxin and diuretics.

Chest X-Ray: 6/21/95 appears to be reported as normal, 4/20/94 # Rib; 2/22/88 normal lungs/pleura; 8/11/89 negative chest; 4/7/93 unchanged since 1992 - peribronchial cuffing sole lung abnormality, but features of edema noted on 4/8/93. On 3/14/94, compared with 4/8/93, decrease in pulmonary venous hypertension (feature of CHF) with increased lung volumes suggesting CHF and COPD.

Other illness include cholecystitis, pancreatitis, back problems, arthroplasty (L. hip). EKG, chest x-ray, echo evidence of LV and LA dysfunction.

Dr. Pembrook's letter claims: reduced FVC in his office in 6/81; "sandblasting" exposure; claims 6/21/95 films are showing increased interstitial markings as a baseline with subsequent development of CHF; a history of renal stones and systemic hypertension.

I cannot assess Dr. Pembrook's data without the relevant records but clearly, Mr. Casey had some cause for CHF - ethanol being high in the list perhaps with other factors. However several comments appear reasonable:

As regards silicosis - the x-ray descriptions are not those of upper zonal round opacities nor of eggshell calcification, **i.e.**, not features of silicosis. The described features are non-specific compatible with smoking/CHF etc. The claim of low FVC is not characteristic of category 1-2 silicosis since PFTs then are normal and clearly there is not complicated silicosis. The ascription of arrhythmias solely to pulmonary heart disease is disingenuous in the fact of overt CHF, LV+, presumptive CAD and L.V. apex systolic bulge (p4 lines 3-4). 02 desaturation occurs in both COPD and CHF.

Opinion: While more (sic) information (**e.g.** PFTs, actual x-rays) is desirable, the evidence presently available is against silicosis and clearly indicates primary cardiac diseases which caused both symptoms and demise.

Claimant has offered the August 4, 2000 supplemental report of Dr. Pembrook (CX 16) as rebuttal to the supplemental report of Dr. Gee (EX 15) and Dr. Pembrook states as follows (CX 16);

"Thank you for your letter of July 27, 2000 notifying me that the

attorneys for the Electric Boat do not intend to depose me in this case. As a result, I have stopped reviewing the very extensive records in this case.

“And thank you also for your letter of July 28, 2000 asking me for a commentary on Mr. Casey’s x-rays and whether I agree with Dr. Gee’s opinion as stated in his July 19, 2000 medical report?

“Before I get started on that I would like to comment on Attorney Griffin’s letter to Embry and Neusner dated July 25, 2000. Attorney Griffin says that she was unable to get Mr. Casey’s Backus Hospital x-ray packet until after the formal hearing. But, the first notice that I had that Attorney Griffin wanted these x-rays was when she called me with that message on June 26, 2000. June 26 was an extremely busy day at work and it would have been impossible for me to comply with her request on that same day. But the very next day I took hours of time from a very busy day to find the x-rays, bundle them up, and send them off to her Hartford office by Express mail. I saved the Express mail receipt so that I can prove what I am saying. I mention this matter only so that the reason that Attorney Griffin didn’t have the x-rays in time was that she did not request them from me until it was already too late to get them to her in time.

“Next, I reviewed Dr. Gee’s report of July 19, 2000 to see if we were indeed talking about the same x-rays?

“This type of comparison did, indeed, reveal some differences. In order to be perfectly specific in identifying films I will always specify the date of the film in this subsequent discussion.

“I also looked at P-a and lateral chest x-rays dated 6-21-95. I thought that the heart size and interstitial markings were normal on this film. I thought that this was an important observation to serve as the baseline for later films? But, I also thought that there was some pleural tenting that became more obvious after referring to later films. Hence, I would have to say that evidence of pleural disease was present on this film.

“There, then, followed a series of portable chest x-rays in 1997. Interpretation of these is more guarded, since findings on portable films is less reliable, expecially where heart size is considered. But with that caution, I did think that the heart size was increased in the portable chest x-ray of 12/31/96? I thought that the film of the following day, January 1, 1997, was now consistent with congestive heart failure. This, also, was a portable chest film. And the portable chest x-ray of 1-2-97 did not show any appreciable changes from the preceding day. But, the non-portable

P-A and left lateral chest x-ray of January 3, 1997 did, I think, reveal increased A-P diameter of the chest.

"The x-ray of August 8, 1997 was a P-A and lateral and I think that by this date the pleural adhesions first seen on the film of 6-21-95. I thought that by now there was definite evidence of diffuse interstitial fibrosis. And the adhesions of the diaphragmatic pleura and thickening of the minor fissure were now much more obvious, especially by comparing with earlier films (and especially the film of 6-21-95). It does not seem unusual to me that x-ray evidence of interstitial disease developing this later after exposure to silica rules out silicosis, since it usually takes years after exposure for x-rays changes of pneumo-coniosis to develop.

"I thought that the portable chest x-ray of September 8, 1997 revealed evidence of cardiomegaly and pulmonary edema. The films of September 9 and 10, 1997 also showed evidence of increased interstitial fluid (consistent with left heart failure).

"And, finally, the portable chest x-ray of September 11, 1997 again showed increased interstitial markings, cardiomegaly, and a calcified aortic knob.

"In summary, this unfortunate man had an abundant exposure to silica in his work at the Electric Boat. He had restrictive changes on spirometry. He had echocardiographic findings that would be almost impossible to explain in any way other than pulmonary hypertension secondary to severe end-stage chronic lung disease. And he had x-ray evidence of diffuse interstitial fibrosis and pleural disease. I would like to take the liberty at this point of reminding you that I was not the only reader of these chest x-rays who thought there was diffuse interstial fibrosis. For instance, the radiologist at Backus Hospital read the September 9, 1997 chest x-ray as showing "underlying chronic generalized interstitial disease."

"Additionally, I think that one would not expect Mr. Casey to have the classic x-ray changes of pulmonary silicosis ----- as for instance, as seen in granite workers in Vermont granite quarries. And that is because Electric Boat workers were exposed to a vast variety of dusts that were toxic to the lungs. You mention some of these yourself in your letter to me dated April 6, 1998. And Dr. Gee, himself, states that "mixed dust pneumoconiosis has radiologic features features somewhat similar to silicosis." It seems to me that one would not expect that silicosis that was acquired at the Electric Boat Company would have the same radiologic features as the pure silicosis acquired in a Vermont granite quarry?

“Thanks for permitting me to consult on this fascinating case.”

John David Casey (“Decedent” herein) married Barbara Lillian Bouman (“Claimant”) on March 8, 1947 and Claimant was living with Decedent at the time of his death. (CX 10)

Decedent passed away on September 24, 1997 and Dr. Paul M. Grief has identified as the immediate cause “cardiopulmonary arrest” due to or as a consequence of “left ventricular failure.” No other condition is identified as a contributing or significant condition. (CX 7) Decedent’s funeral expenses exceeded $3,000.00. (CX 6)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff’d**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the

requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of

causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not totally rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out totally any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The totally "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable.

See Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, if the record establishes a work accident which could have caused the harm, thereby invoking the Section 20(a) presumption. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette

smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The forthright testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the

whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1998).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his "severe pulmonary hypertension" and "silica-induced severe pulmonary interstitial fibrosis," resulted from his exposure to and inhalation of asbestos and other injurious pulmonary stimuli at the Employer's shipyard. However, the Employer has introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966);

Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant’s injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar, the Claimant has offered the reports of Dr. Pembrook in support of her claim that her husband’s “severe pulmonary hypertension” and “silica-induced severe pulmonary interstitial fibrosis” resulted from his exposure to and inhalation of silica dust and other injurious pulmonary stimuli at the Employer’s shipyard. On the other hand, the Employer has offered the reports and testimony of Dr. J. Bernard L. Gee in support of its position that there is no causal relationship between the alleged body harm and Decedent’s maritime employment.

Initially, I note that I have given greater weight to the opinions of Dr. Pembrook as I find his opinions to be well-reasoned and well-documented. I also note that Dr. Pembrook is the only physician in this record who has examined the Decedent and, while that physical examination took place on May 11, 1981, what is significant is that Dr. Pembrook was retained by the Employer to conduct that physical examination in connection with Decedent’s work-related back injury on July 8, 1977, and the doctor’s report deals not only with Decedent’s orthopedic problems but also with

the pulmonary symptoms that were affecting him event at that time. I further note that Dr. Pembrook opined that Decedent could not return to work as a warehouseman but that he could return to work as a sales representative in view of his multiple medical problems. Dr. Pembrook's opinions have been extensively summarized above and I will simply note at this point that I accept and give greater weight to those opinions as more probative and persuasive.

Mr. Peterson testified credibly before me that Decedent's work exposed him to silica dust and sandblasting debris during his maritime employment and that testimony stands uncontradicted. As summarized by Dr. Pembrook, the Employer's first injury reports of July 13, 1973, August 23, 1973, July 2, 1974 and June 27, 1974 all reflect that Decedent worked in close proximity to sandblasting operations, even though Decedent's job title was that of a warehouseman. (CX 1)

While I am impressed with the professional and academic qualification of Dr. Gee (EX 12), I simply cannot accept the doctor's opinions in this case because the doctor attributes Decedent's pulmonary problems solely to his longstanding cigarette smoking history of many years. As noted above, Decedent's pulmonary problems were symptomatic as far back as May 11, 1981, but at that time the doctors, including Dr. Pembrook, were more concerned with treating Decedent's lumbar problems resulting from his 1977 back injury, one which rendered him totally disabled and forced him to stop working.

Dr. Gee testified before me at the hearing and it was apparent that his opinions wavered in the face of intense cross-examination, that he often turned the question around to his point-of-view and that he also refused to answer other questions forthrightly. I also note that Dr. Gee did not consider the synergistic effect between Decedent's extensive cigarette smoking, inhalation of injurious pulmonary stimuli and the development of severe pulmonary problems, a hybrid of obstructive and restrictive pulmonary disease, as reflected in the well-reasoned and well-documented opinions of Dr. Pembrook, a physician who has had the benefit of a physical examination of the Decedent, as opposed to Dr. Gee whose opinions are based solely on a review of Decedent's medical records.

Accordingly, I find and conclude that Decedent's bodily harm, as diagnosed and chronicled by Dr. Pembrook, constitutes a work-related injury, that the date of injury is August 8, 1997, based on Decedent's chest x-rays on that day which were helpful to Dr. Pembrook in diagnosing pulmonary silicosis, that the Employer had

timely notice of Decedent's injury and death and that Claimant timely filed for benefits once a dispute arose between the parties.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of her husband's disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that her husband could not return to work as a warehouseman on and after August 21, 1977 because of his work-related back injury, and at which his leave of

absence ended. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Decedent's injury had become permanent as of the date found by Judge Neusner. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock**

Company, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979).

On the basis of the totality of the record, I find and conclude that Decedent was permanently and totally disabled from September of 1977, according to the well-reasoned opinion of Dr.

Pembrook, when Decedent was forced to discontinue working as a result of his work-related back injury.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Decedent may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the

relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Decedent is a so-called voluntary retiree under the Act because he had to stop working because of his work-related back injury in 1977 and because his pulmonary problems were not diagnosed until 1997 during his hospitalization at the Backus Hospital.

Accordingly, Claimant's Death Benefits shall be based upon the National Average Weekly Wage as of the date of death, or $400.57, commencing on September 25, 1997, the day after his death.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591

F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an

award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on September 25, 1997, the day after her husband's death, based upon the National Average Weekly Wage $400.57 as of that date, pursuant to Section 9, as I find and conclude that Decedent's death resulted from a combination of his work-related pulmonary problems and his cardiac problems. While the Death Certificate certifies as the immediate cause of death, cardio-pulmonary arrest (CX 7), Dr. Pembrook has opined that Decedent's pulmonary condition was a factor in his eventual demise. (CX 1) and Dr. Pembrook forthrightly expresses the opinion that although not the primary cause of his death, the reduced pulmonary reserve therefrom [**i.e.**, silica-related lung disease with long-standing respiratory impairment] was probably a significant contributory factor to hastening the death of the Decedent on September 24, 1997. (CX 1) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment

for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her husband's work-related injury on or about October 24, 1997 and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not pay for such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, the Employer is responsible for the reasonable, necessary and appropriate medical care and treatment related to the diagnosis, evaluation and palliative treatment of Decedent's pulmonary problems between August 8, 1997 and his death on September 24, 1997.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted the entitlement to benefits by the Decedent. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v.**

General Dynamics Corp., 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Decedent worked for the Employer from November 8, 1961 through his August 21, 1977 leave of absence granted him because of his inability to return to work because of his July 6, 1977 back injury, a shipyard accident that resulted in his permanent and total disability (CX 12), (2) that Decedent experienced rheumatic fever in 1942, (3) that he also suffered from scarlet fever, hypertension, emphysema, congestive heart failure, chronic pulmonary silicosis for many years, (4) that he had a personal history of a very heavy cigarette smoking history of at least 20 pack years, as well as chronic ethanol abuse, (5) that all such conditions combined with and coalesced with and contributed to his severe pulmonary hypertension resulting in pulmonary edema and triggering his fatal cardioarrythmia and cardiopulmonary arrest, the immediate cause of death and (6) that Decedent's permanent partial impairment is the result of the combination of his pre-existing permanent partial disability (**i.e.**, his above-identified medical problems) and his August 1, 1997 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Pembrook (CX 1, CX 5, CX 16). **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Decedent's condition, prior to his final injury on August 8, 1997, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

As Decedent was a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for his silica-induced pulmonary problems (CX 1), only Decedent's prior pulmonary problems can

qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. **See**, **e.g.**, **MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.)**, **supra**, 21 BRBS at 279."

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom.**, **Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the combination of coalescence of a prior injury with a present one. **Duncanson-Harrelson Company v. Director, OWCP**, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982).

Moreover, the Benefits Review Board has held, as a matter of law, that a decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle employer to Section 8(f) relief because they **cannot contribute** to decedent's disability under Section 8(c)(23). **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989). In **Adams**, the Board held that Section 8(c)(23) compensates "only the impairment due to occupational lung disease" and "only decedent's pre-existing COPD (chronic obstructive pulmonary disease) could have combined with decedent's mesothelioma to cause a materially and substantially greater disease of occupational disease-related disability. Accordingly, decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to a Section 9 Death Benefits claim, only decedent's COPD could, as a matter of law, be a pre-existing disability contributing to decedent's death in this case." **Adams**, **supra**, at 85.

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the AMA Guides. Therefore, where the first medical evidence of record sufficient to establish a permanent impairment of decedent's lungs under the AMA Guides was an April 1985 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March

5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

As noted above, the Employer has satisfied the **tri-partite** requirements for Section 8(f) relief and is entitled to the limiting provisions thereof.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after October 20, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition has just been filed by Claimant's counsel and Employer's counsel shall have ten (10) days to comment thereon. I shall award the fee in a supplemental decision.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay Decedent's widow, Barbara L. Casey, ("Claimant"), Death Benefits from September 25, 1997, based upon the National Average Weekly Wage of $400.57, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

2. The Employer shall reimburse or pay Claimant reasonable funeral expenses of $3,000.00 pursuant to Section 9(a) of the Act.

3. The Employer shall pay for or reimburse the medical provider with reference to the reasonable, necessary and appropriate medical expenses relating to the diagnosis, evaluation and palliative treatment of Decedent's work-related injury referenced herein, between August 8, 1997 and September 24, 1997, subject to the provisions of Section 7 of the Act.

4. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Employer.

5. As Claimant's counsel has filed his fee petition, Employer's counsel shall have ten (10) days to comment thereon.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl